Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1976
No. 76-1154

STEFFRON, INC., *Petitioner*

vs.

ELMER A. LUSKEY, JR. and
ROSE MARIE LUSKEY, his wife,
and W. ANTHONY DUNN,
Respondents

PETITION OF STEFFRON, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

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PETITION OF STEFFRON, INC. FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To The Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Steffron, Inc. respectfully prays that a Writ of Certiorari issue to review the decisions of the Supreme Court of Pennsylvania entered in this case on April 17, 1975, and November 24, 1976.

OPINIONS BELOW

The unreported Opinion and Decree of the Court of Common Pleas of Allegheny County, Pennsylvania, dated September 30, 1974, is appended hereto at 10a, et seq. of the Appendix.

The Opinion and Order of the Supreme Court of Pennsylvania dated April 17, 1975 is reported at 461 Pa. 305, 336 A.2d 298, and appended hereto at 1a, et seq. of the Appendix.

The Opinion and Order of the Supreme Court of Pennsylvania dated November 24, 1976 is reported at 366 A.2d 223, and appended hereto at 6a, et seq. of the Appendix.

JURISDICTION

Petitioner seeks review of the decision of the Supreme Court of Pennsylvania entered April 17, 1975, and also of the decision and Order of the Supreme Court of Pennsylvania which was entered November 24, 1976, after reargument and stay of proceedings had been ordered by the Supreme Court of Pennsylvania on May 9, 1975. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(c).

QUESTIONS PRESENTED

Does a procedure which provides for notice of a judicial sale of real estate upon execution by advertising and posting, alone, deny due process of law to a judgment debtor who does not reside in the County in which the real estate is located?

Did notice of a sheriff's sale of real estate upon execution by advertising and posting, alone, deny due process of law to a judgment debtor who, himself, most recently acquired the property through a sale by the same sheriff and, accordingly, should have been familiar with the procedure involved?

CONSTITUTIONAL PROVISIONS AND PENNSYLVANIA RULE OF CIVIL PROCEDURE INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States, in relevant part, provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Pennsylvania Rule of Civil Procedure 3129, as it existed at the time of the sheriff's sale in this case, is set forth in full at 30a, et seq. of the Appendix.

STATEMENT OF THE CASE

This was an action in Equity begun on December 12, 1973, by Elmer A. Luskey, Jr. and Rose Marie Luskey, his wife, for cancellation of a sheriff's deed and reconveyance of property formerly owned by Plaintiffs which had been conveyed by the Sheriff of Allegheny County to Petitioner, Steffron, Inc., as a result of a sheriff's sale.

Plaintiffs are husband and wife who reside in Lawrence County, near Slippery Rock, Pennsylvania. The property in question, is located in the Fifth Ward of the City of Pittsburgh, Allegheny County, Pennsylvania, and at all times here relevant was vacant land which had been designated as Block 26-R, Lot Nos. 80 and 114, by the Deed Registry of Allegheny County. Lot No. 80 is a steep hillside and has no value except in conjunction with other real estate. Plaintiffs had acquired the entire property as a result of confession of judgment upon a bond secured by a purchase money mortgage, execution upon the judgment and sheriff's sale, as a result of which a sheriff's deed was issued to them by the Sheriff of Allegheny County, Pennsylvania, on April 6, 1970. Thereafter, on November 3, 1972, Albert B. Starr obtained a judgment against Plaintiffs in an assumpsit action in which Elmer A. Luskey, Jr. and his wife entered their appearance and in which Mr. Luskey testified. This judgment remained unpaid until April 4, 1973, when the judgment was assigned to Steffron, Inc.

On April 10, 1973, Steffron, Inc. issued execution against the property and directed the Sheriff of Allegheny County to levy upon, post, advertise and sell the property to satisfy its judgment. In accordance with Pa. R.C.P. 3129,[1] the sale of the property was advertised in the Pittsburgh Press on Saturday, April 14, 21 and 28, 1973, and in the Pittsburgh Legal Journal on April 13, 19 and 27, 1973, and Notice of the

[1]Appendix, 30a, *et seq*.

Sale was posted in the Sheriff's office and on the property on April 26, 1973. The Court of Common Pleas of Allegheny County having adopted no other provisions for notice pursuant to Pa. R.C.P. 3129(e), the Luskeys were given no additional notice of the sale, although their address was available from the tax records of Allegheny County.

On May 7, 1973, the Sheriff of Allegheny County sold the property to Steffron, Inc. for costs, taxes and liened water charges in the amount of $1,701.27 which represented City and School Taxes from 1969 through 1973, County Taxes for 1971 and 1972 and liened water charges from 1970 through 1973. A deed to Steffron, Inc. was acknowledged on June 15, 1973. On June 21, 1973 this deed was registered in the Deed Registry of Allegheny County, on June 29, 1973 the Sheriff's Return was filed in the Office of the Prothonotary of the Court of Common Pleas of Allegheny County, and on July 9, 1973 the Sheriff's Deed was delivered to Steffron, Inc. No proceedings to establish a deficiency arising from this sale were begun by Steffron, Inc.[2]

On or about November 13, 1973, Elmer A. Luskey and his wife entered into an agreement to sell a portion of the property, specifically that designated as Block 26-R, Lot No. 114, to W. Anthony Dunn. After Plaintiffs filed an Amended Complaint in this case in which they alleged, inter alia, that "the taking of plaintiffs' realty without effort reasonably calculated to give them actual notice of the Sheriff's sale constitutes a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States," W. Anthony Dunn was permitted to intervene in the proceedings. An Answer to

[2]Under Pennsylvania law, whenever real estate is sold at a judicial sale to the Plaintiff in the execution proceedings, all liability under the judgment is discharged unless the Plaintiff petitions to fix the fair market value of the property within six months after the sale. Act of July 16, 1941, P.L. 400, §1 et seq., Pa. Stat. Ann. tit. 12, §2621.1 et seq.

Plaintiff's Amended Complaint was filed by Steffron, Inc. and Replies thereto were filed by the Plaintiffs and Intervenor. Steffron, Inc. moved for judgment on the pleadings.[3] The Court of Common Pleas of Allegheny County denied the motion of Steffron, Inc. and, having decided all State law issues against Plaintiffs, granted judgment on the pleadings in their favor.[4] It did so on the basis that Pa. R.C.P. 3129, in failing to provide for actual notice of the sheriff's sale to the Plaintiffs, denied them due process of law, and also that Plaintiffs were denied equal protection of the laws because the Court of Common Pleas of Philadelphia County had provided for mailed notice pursuant to Pa. R.C.P. 3129(e), whereas the Court of Common Pleas of Allegheny County had not.[5]

On Appeal to the Supreme Court of Pennsylvania, the Court, in its Opinion of April 17, 1975, affirmed solely on the basis of the due process clause of the United States Constitution, the Court stating that the notice provisions of Pa. R.C.P. 3129 may have been sufficient when owners of real estate resided on or lived nearby their property, but that, "[i]n today's urban society, the owners of real estate often live far removed from the area wherein their property is situated."[6] On May 9, 1975, the Supreme Court of Pennsylvania, *sua sponte*, stayed proceedings in this case

[3]Presumably because the constitutionality of Pa. R.C.P. 3129 did not call into question the constitutionality of an Act of Assembly, the Attorney General of Pennsylvania was not notified pursuant to Pa. R.C.P. 235 and he has not appeared in these proceedings.

[4]Upon the filing of a Motion for Judgment on the Pleadings, the Court, under Pa. R.C.P. 1034(b), enters such judgment or order as may be proper on the pleadings. For purpcses of entering such an order against a party, the truth of all of his well pleaded facts, as well as the untruth of all properly denied allegations, are admitted. 2B Anderson, Pennsylvania Civil Practice, §1034.14(b) (1969 & Supp. 1976).

[5]Appendix, 16a, *et seq*.

[6]Appendix, 3a.

and ordered Reargument.[7] Then, in an Opinion and Order dated November 24, 1976, the Supreme Court of Pennsylvania affirmed the Court of Common Pleas of Allegheny County on the same basis as set forth in its Opinion of April 17, 1975, but held that its earlier decision should be applicable only to sheriff's sales initiated after April 17, 1975, because "it would be manifestly unfair to negate clear titles to real estate purchased in good faith at sheriff's sales based on prior notice provisions".[8] Two Justices concurred on the basis that they would apply the decision of April 17, 1975, to all sheriff's sales initiated after that date and also to all proceedings pending on April 17, 1975 in which the inadequacy of notice had been raised.[9]

[7]Appendix, 5a.

[8]Appendix, 8a.

[9]Appendix, 9a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA IN THIS CASE REJECTS THE REASONING OF THIS COURT IN ENDICOTT-JOHNSON CORP. V. ENCYCLOPEDIA PRESS, INC. AND GOES BEYOND THIS COURT'S DECISION IN MULLANE V. CENTRAL HANOVER TRUST CO.

In 1924 *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, held that no notice to a judgment debtor was necessary before issuing a garnishment upon the judgment. With one exception, the cases which have been called upon to decide the same question have followed this decision. See, *Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976), *Taylor v. Madigan*, 53 Cal. App. 3d 943, 126 Cal. Rptr. 376 (1975), *Halpern v. Austin*, 385 F. Supp. 1009 (N.D. Ga. 1974), *Katz v. Ke Nam Kim*, 379 F. Supp. 65 (D. Haw. 1974), *Langford v. Tennessee*, 356 F. Supp. 1163 (W.D. Tenn. 1973) and *Moya v. DeBaca*, 286 F. Supp. 606 (D.N.M. 1968), *appeal dismissed*, 395 U.S. 825 (1969); *accord, First National Bank v. Hasty*, 410 F. Supp. 482 (E. D. Mich. 1976).[10] It's reasoning was that, "after the rendition of a judgment [the judgment debtor] must take notice of what will follow, no further notice being necessary to advance justice". *Endicott-Johnson Corp. v. Encyclopedia Press, Inc., supra*, at 288. This reasoning was further elaborated upon in *Zimek v. Illinois Nat'l Cas. Co.*, 370 Ill. 572, 574-5, 19 N.E. 2d 620, 622 (1939), as follows:

> "The garnishment process is remedial in nature, designed to reach property belonging to the judgment debtor. . . . It is not a distinct and separate suit, but an

[10]The sole exception is *Scott v. Danaher*, 343 F. Supp. 1272 (N.D. Ill. 1972), which distinguished *Endicott-Johnson* and *Zimek v. Illinois Nat'l Cas. Co.*, 370 Ill. 572, 19 N.E. 2d 620 (1939), because the case involved a judgment by confession whereas *Endicott-Johnson* and *Zimek* did not.

additional step in the original action for judgment....His knowledge of the principal action against him is sufficient warning that his adversary may be expected to take all available steps to obtain satisfaction of any judgment rendered."

It was against this background that Mr. Justice Jackson in *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 316 (1950), wrote:

"Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding. It is true that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning. The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank v. Luckett*, 321 U.S. 233; *Security Savings Bank v. California*, 263 U.S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard v. Hunter*, 204 U.S. 241; *Huling v. Kaw Valley R. Co.*, 130 U.S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, 'It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it.'"

Few would seriously advance the proposition that no notice of any kind to a judgment debtor is necessary in the case of execution proceedings. The Supreme Court of Pennsylvania, however, has rejected the *ratio decidendi* of *Endicott-Johnson* that a judgment debtor is on notice of the likelihood of execution by virtue of the proceedings by which judgment was obtained and also has rejected the language of *Mullane* to the effect that where a person has been otherwise apprised of the proceedings, a state may indulge in the assumption that he has left some caretaker under a duty to let him know if his property is jeopardized.

II. THE QUESTIONS PRESENTED IN THIS CASE HAVE LONG GONE UNANSWERED BY THIS COURT.

In 1967 this Court granted certiorari in the case of *Hanner v. DeMarcus*, 398 U.S. 926, which involved facts almost identical to those in the instant case. Thereafter, over the strenuous dissent of Justices Douglas and Black and the dissent of Mr. Justice Brennan, all of whom would have reviewed the decision in *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285 (1924), this Court dismissed the Writ as improvidently granted. *Hanner v. DeMarcus*, 390 U.S. 736 (1968). Since that time this Court has still not reviewed *Endicott-Johnson*.

Endicott-Johnson Corp. v. Encyclopedia Press, Inc., supra, dealt with the question of pre-attachment notice. Having reached the decision which it did, it did not face the question of what notice would have been required. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950), dealt with this general area. In the course of its decision it distinguished between the facts there involved and cases dealing with levy upon tangible personal property and upon real estate. *Mullane v. Central Hanover Trust Co., supra*, at 316. In so doing, it cited, presumably by way of example, a real estate

tax sale case. *Ballard v. Hunter*, 204 U.S. 241 (1907). Since then, with the possible exception of *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), and *Schroeder v. City of New York*, 371 U.S. 208 (1962), both of which were condemnation cases, this Court has not decided a case dealing with the area delineated by *Mullane* as an exception to the rule announced in the case. The instant case raises both the question of the continuing validity of the reasoning in *Endicott-Johnson* and the question of the scope and continuing validity of the exception expressed in *Mullane*.

III. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA REJECTS THE REASONING IN A NUMBER OF REAL ESTATE TAX SALE CASES IN OTHER STATES, THEREBY UNDERMINING THEIR VALIDITY.

Although there have been suggestions that real estate tax sales are *sui generis*, *E.g. Auburn v. Mandarelli*, 320 A2d 22 (Me.), *appeal dismissed*, 419 U.S. 810 (1974), most decisions which have upheld procedures in real estate tax sales which provide notice only by advertising have done so on the basis that the owner of real estate knows that there are taxes due and that the failure to pay them will ultimately result in foreclosure or sale. See, *Botens v. Aronauer*, 32 N.Y. 2d 243, 298 N.E. 2d 73, *appeal dismissed*, 414 U.S. 1059 (1973), *Catoor v. Blair*, 358 F. Supp. 815 (N.D. Ill.), *aff'd*. 414 U.S. 990 (1973), *Christie-Stewart, Inc. v. Paschall*, 502 P.2d 1265 (Okla. 1972), *vacated and remanded*, 414 U.S. 100 (1973), and *City of Newark v. Yeskel*, 5 N.J. 313, 74 A2d 883 (1950). The decision of the Supreme Court of Pennsylvania having rejected the reasoning of *Endicott-Johnson* to the effect that knowledge of the proceedings leading to judgment puts the debtor on notice of what will follow, it necessarily rejects the

virtually identical reasoning in these real estate tax sale cases and, as such, undermines their validity.[11]

IV. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA CASTS DOUBT UPON THE CONSTITUTIONAL VALIDITY OF EXECUTIONS UPON REAL ESTATE IN A MAJORITY OF THE STATES OF THE UNITED STATES.

Of the forty-eight states of the Union and the District of Columbia which permit execution on real estate,[12] twenty-seven states provide a period of redemption which ranges from as little as seventy-five days in the case of subdivided real estate in Colorado[13] to two years for all real estate in Tennessee.[14] Most redemption periods are for one year. Twenty-one states and the District of Columbia provide for no redemption after confirmation of an execution sale of real estate. Of these states, other than Pennsylvania, only six require personal service or mailing of the Writ or Notice of the Sale upon non-residents.[15] Eleven states[16] and the District of Columbia[17] give notice only by posting and advertising,

[11]The November 24, 1976, decision of the Supreme Court of Pennsylvania specifically noted that municipalities had relied upon prior notice procedures. Appendix, 8a.

[12]No execution upon real estate is permitted in Virginia, *Davis v. National Grange Ins. Co.*, 281 F. Supp. 998 (E.D. Va. 1968), or in West Virginia, *Maxwell v. Leeson*, 50 W. Va. 361, 40 S.E. 420 (1901).

[13]Colo. Rev. Stat. §38-39-102.

[14]Tenn. Code Ann. §64-801.

[15]Conn. Gen. Stat. §52-356; Ga. Code §39-121; La. Code Civ. Prac. Ann. art. 2293; N.C. Gen. Stat. §1-339.54; N.Y. Civ. Prac. Law §5236; and Tex. R.C.P. 647. Until 1965 New York required service upon all creditors of record, but not upon the judgment debtor.

[16]Fla. Stat. §56.21; Haw. Rev. Stat. §651-43; Ky. Rev. Stat. §§426.130 and 426.200; Md. Cts. & Jud. Proc. Code Ann. §11-502; Miss. Code Ann. §13-3-163; Neb. Rev. Stat. §25-1529; N.J. Rev. Stat. 2A:61-1; Ohio Rev. Code §2329.26; Okla. Stat. tit. 12, §764; R.I. Gen. Laws §9-26-16; and S.C. Code §10-1758-9.

[17]D.C. Code §15-314.

two states make personal service on the debtor only if he is a resident of the County[18] and Missouri makes personal service only on residents of the state and then only if the property is located in a County other than that of their residence.[19] The decision of the Supreme Court of Pennsylvania calls into question the constitutionality of executions in each of these jurisdictions. In addition, of those jurisdictions providing for redemption, sixteen states provide no notice of sale other than posting and advertising,[20] two states provide for service of notice to the debtor only if in possession of the property,[21] Minnesota provides service only upon residents of the County[22] and New Hampshire provides service only upon residents of the state.[23] The validity of executions upon real estate in these states also is clouded by the Supreme Court of Pennsylvania's decision.[24] In fact, only thirteen states which now provide for service or mailing of the Writ or Notice of Sale in all cases will be unaffected by the decision in this case.[25]

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[18]Del. Code tit. 10, §4973 and Ind. Code §34-1-36-1.

[19]Mo. Rev. Stat. §513.225.

[20]Ala. Code tit. 47, §536; Alaska Stat. §09.35.140; Ariz. Rev. Stat. §12-1621; Ark. Stat. Ann. §30-417; Idaho Code §11-302; Ill. Ann. Stat. ch. 77, §14; Mich. Comp. Laws §600.6052; Mont. Rev. Codes Ann. §93-5824; Nev. Rev. Stat. §21.130(3); N.M. Stat. Ann. §24-2-1; Or. Rev. Stat. §23.450; S.D. Compiled Laws Ann. §15-19-8; Utah Code Ann. R.C.P. 69(e)(1); Wash. Rev. Code §6.24.010; Wis. Stat. §272.31; and Wyo. Stat. §1-478.

[21]Iowa Code §626.78 and Tenn. Code Ann. §26-703.

[22]Minn. Stat. §550.19.

[23]N.H. Rev. Stat. Ann. §529:20-21.

[24]For a recent case in which the existence of a redemption period did not eliminate a notice problem in a deed of trust foreclosure by sale, see *Ricker v. United States*, 417 F. Supp. 133 (D. Me. 1976).

[25]This does not include Pennsylvania whose Rule of Civil Procedure 3129 was amended effective November 6, 1975.

V. THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA RAISES SERIOUS DOUBTS AS TO WHETHER LIENS HAVE BEEN AND WILL BE CONSTITUTIONALLY DIVESTED BY JUDICIAL SALES HELD UNDER EXISTING PROCEDURES.

Although a lien creditor, at least in condemnation cases, has been held to be entitled to the same constitutional protection as that of an owner, *Laz v. Southwestern Land Co.*, 97 Ariz. 69, 397 P.2d 52 (1964); *Pioneer S. & L. Co. v. City of Cleveland*, 479 F.2d 595 (6th Cir. 1973), only New York State provides for service of notice of an execution sale upon creditors holding liens upon the property sold.[26] Yet, at least in the case of junior lien creditors, an execution sale will divest their liens. IV American Law of Property §18.64, pp. 771-2 (A. J. Casner ed. 1952).

Prior to the decision of the Supreme Court of Pennsylvania in this case, the absence of personal notice to lien creditors would not have appeared to raise a serious constitutional problem. This Court in *Scott v. Paisley*, 271 U.S. 632, 635-6 (1926), had plainly said:

> "the law imposes no duty upon a person holding a prior mortgage or deed of trust to notify one holding a similar or junior lien or incumbrance upon the same property of his intention to sell the property under his mortgage or deed of trust"....it [is] the duty of the subsequent lienor "to keep advised as to proceedings...."

These statements which were made with reference to deed of trust foreclosures are all the more persuasive in view of the fact that *Scott v. Paisley* dealt with sale upon execution after the entry of a judgment. Recently, the foregoing rule was upheld in a deed of trust foreclosure in *S & G*

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[26]N.Y. Civ. Prac. Law §5236.

Investment, Inc. v. Home Federal S. & L. Ass'n, 505 F.2d 370 (D.C. Cir. 1970), and the constitutional argument based upon *Mullane* was made by junior lien creditors and rejected by the Court with respect to an execution sale in *Chonowski v. Bonucci*, 47 Ill. 2d 519, 267 N.E. 2d 671 (1971). The decision by the Supreme Court of Pennsylvania casts doubt on the validity of these decisions and raises questions as to whether junior lien creditors are being and have been constitutionally divested by execution sales held under existing procedures.

VI. PROSPECTIVE APPLICATION OF THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA DID NOT SOLVE THE PROBLEM OF DISRUPTING TITLES TO REAL ESTATE ACQUIRED AT JUDICIAL SALES.

After the decision by the Supreme Court of Pennsylvania of April 17, 1975 was handed down, in part because of the absence of anything other than the most cryptic guidance contained in that Opinion for the Courts of Common Pleas of Pennsylvania and in part because of the almost immediate Order for Reargument which gave no indication of the reasons therefor or of the issues to be argued and briefed,[27] great uncertainty as to the validity of past and present sheriff's sales was created throughout the

[27] Appendix, 5a. The statement by the Supreme Court of Pennsylvania in its Opinion of November 24, 1976 that it "granted reargument . . . for the purpose of determining the effective date of *Luskey No. 1*", Appendix, 7a, is not only inaccurate, but less than ingenuous. The Order for Reargument was entered *sua sponte*, and gave no guidance to Counsel. In fact, on May 15, 1975, Counsel for Respondents filed a Petition for Clarification of the Order of May 9, 1975 requesting guidance as to what issues were to be briefed and argued on Reargument. This Petition was not responded to until November 24, 1976 when the Court, Per Curiam, entered the following Order: "Petition Moot. See Opinion in the instance case." As a result, the question of prospective application of *Luskey No. 1* was never briefed or argued by the parties to this case.

Commonwealth of Pennsylvania. *See*, Civil Procedural Rules Committee Explanatory Comment. Pa. Cons. Stat. Ann. tit. 42, R.C.P. 3129 (Supp.). This same uncertainty exists in all but thirteen states as the result of the decision by the Supreme Court of Pennsylvania. *See, supra*, pp. 11-12. In addition, in making its decision prospective, the Supreme Court of Pennsylvania did not solve the problem of affecting titles to real estate acquired at judicial sales initiated after April 17, 1975, but before November 6, 1975, which was the effective date of the amended Rule 3129 adopted by the Supreme Court of Pennsylvania.[28]

In its Opinion of November 24, 1976, the Supreme Court of Pennsylvania made its decision of April 17, 1975 in this case applicable to all sheriff's sales initiated after April 17, 1975. In so doing, presumably, it followed the decisions of this Court in *Johnson v. New Jersey*, 384 U.S. 731 (1966), *Stovall v. Denno*, 388 U.S. 293 (1967) and *Desist v. United States*, 394 U.S. 244 (1969).[29] It did so because "as of April 17, 1975, the date of *Luskey No. 1*, notice was given to municipalities, courts and the legal profession that notice by publication in sheriff's sales was no longer constitutional".[30]

[28] Prior to January 1, 1969 the Supreme Court of Pennsylvania was empowered to prescribe by general rule the forms of actions and the practice and procedure in civil actions at law and in equity for the courts of common pleas. Act of June 21, 1937, P.L. 1982, as amended, 17 Pa. Stat. Ann. §61 et seq. It was pursuant to this authority that it adopted the former Rule 3129 effective November 1, 1960. By amendments to the Pennsylvania Constitution enacted April 23, 1968, effective January 1, 1969, Article V, Section 10(c) vested in the Supreme Court of Pennsylvania the power to prescribe general rules governing practice, procedure and the conduct of all courts. It was pursuant to this authority that Pa. R.C.P. 3129 was amended on November 6, 1975.

[29] The two concurring Justices of the Supreme Court of Pennsylvania would have followed the decisions of this Court in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966).

[30] Appendix, 7a.

In so doing, however, the Supreme Court of Pennsylvania overlooked the decision of this Court in *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

In *Wuchter v. Pizzutti, supra*, this Court held that if a statute did not provide for constitutionally proper notice, it could not be supplied by action which was not directed by the statute. As the Supreme Court of Delaware said, due process requires "notice directed by the statute itself, and not a voluntary or gratuitous notice resting in favor or discretion". *Webb Packing Co. v. Harmon*, 39 Del. 22, 28, 196 Atl. 158, 162 (1937), *accord, Harris v. Bates*, 270 S.W. 2d 763 (Mo. 1954), *Commercial Credit Corp. v. Congelton*, 21 N.J. Super. 88, 90 A.2d 550 (1952). Accordingly, after April 17, 1975 and until November 6, 1975, although municipalities and the legal profession knew of the decision by the Supreme Court of Pennsylvania in this case, they could not supply constitutional notice to Pa. R.C.P. 3129 and any judicial sales initiated after April 17, 1975 in Counties whose Court of Common Pleas had not adopted a local Rule such as existed in Philadelphia County necessarily involved the same constitutional infirmities, if any, which existed in the sheriff's sale in this case.

CONCLUSION

For the foregoing reasons, this Petition should be granted and a Writ of Certiorari should be issued in this case to the Supreme Court of Pennsylvania.

Respectfully submitted,

EDWARD C. LECKEY
Attorney for Petitioner

In The Supreme Court of Pennsylvania

WESTERN DISTRICT

ELMER A. LUSKEY, JR. and ROSE MARIE LUSKEY, his wife and W. ANTHONY DUNN v. STEFFRON, INC., a corporation *Appellant*	No. 71 March Term, 1975 Appeal from the Decree of the Court of Common Pleas of Allegheny County, Civil Division, at No. 2850 January Term, 1974 — Equity

OPINION OF THE COURT

O'BRIEN, J. FILED: April 17, 1975

This appeal arises from a final decree in equity which set aside a sheriff's sale in Allegheny County.

The facts surrounding this appeal are as follows. In 1967 the Luskeys (appellees) of Slippery Rock, Lawrence County, were the record owners of two vacant parcels of land located in the Fifth Ward in the City of Pittsburgh. Subsequent to 1967, appellees sold the property and took back a bond and mortgage for the purchase price of the two parcels. The purchaser of the property defaulted on the mortgage and appellees foreclosed on the property and purchased the property at a sheriff's sale on May 15, 1970. The sheriff's deed to appellees was recorded on May 28, 1970.

Subsequent to the above sheriff's sale, a civil suit was filed against appellees by Albert B. Starr and, after hearing in which appellees participated, a judgment in the amount of

$2,317.74 was entered against appellees on November 3, 1972. The judgment was not paid, and on April 4, 1973, Albert B. Starr assigned the judgment to appellant, Steffron, Inc. (Steffron). On April 10, 1973, Steffron, without notice to appellees, caused a writ of execution to issue against the property in the Fifth Ward in the City of Pittsburgh, and, pursuant to Pa.R.C.P. No. 3129, the sheriff posted handbills, advertised and sold the property at sheriff's sale. On May 3, 1973, Steffron bought the property for $1,701.27 which amount comprised costs, taxes and liened water charges. The property had been valued at $52,000 previous to the sale. Steffron recorded its sheriff's deed on November 30, 1973.

On November 13, 1973, the Luskeys entered into a sales agreement with appellee W. Anthony Dunn to sell him one of the parcels sold at the sheriff's sale. The Luskeys then learned of the sheriff's sale and brought an action to set aside the sale, and W. Anthony Dunn was permitted to intervene and adopt the Luskeys' complaint.

The complaint alleged, *inter alia*, that the sale to Steffron should be set aside because the Luskeys received no personal notice of the proposed sheriff's sale on May 3, 1973, at which time the property was bought by Steffron. The chancellor, after hearing argument on Steffron's motion for judgment on the pleadings filed by Steffron, granted the Luskeys relief, holding that the sheriff's sale to Steffron was null and void for lack of personal notice to the Luskeys. This appeal followed.

The thrust of appellees' and the chancellor's position is that Pa.R.C.P. No. 3129, which provides:

> "(a) Notice of the sale of real property shall be given by the sheriff by handbills posted in the sheriff's office, and upon the property at least ten (10) days prior to sale, briefly describing the property to be sold, its location, the improvements, if any, the judgment of the court on which sale is being held, the name of the owner or reputed owner and the time and place of sale.
>
> "(b) Notice as provided in Subdivision (a) shall also be given by publication by the sheriff once a week for three (3) successive weeks in a newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices, the first publication to be made not less than twenty-one (21) days before the date of sale."

denies due process of law in that it does not provide for personal notice to the owner of real estate that is the subject of a sheriff's sale. We agree with that determination. In our opinion, the provisions for notice in Pa.R.C.P. No. 3129 does not satisfy the due process clause of the United States Constitution. The rule provides that the only notice that need be given to a record owner of real estate subject to a sheriff's sale is the posting of handbills and notice in the newspaper of the county wherein the property is located. While this type of notice may have been sufficient in the time when the owners of real estate either resided on their real estate or lived in close proximity to it, such is not the situation today. In today's urban society, the owners of real estate often live far removed from the area wherein their property is situated. To expect a record owner to visit his property periodically to check for sheriff's handbills or to read the newspaper of the district where his property is located is to accept the common-law presumption that an owner of real estate visits his property every thirty days; such is not the case in today's society.

We therefore conclude that the notice provision of Pa.R.C.P. No. 3129 does not satisfy due process of law. Cf. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), Cf. *S & G Investment Inc. v. Home Federal Sav. & L. Ass'n* 505

F.2d 370 (1974). See also *Doherty v. Adal Corporation*, 437 Pa. 109, 261 A.2d 311 (1970).[1]

Decree affirmed. Each party to bear own costs.

Mr. Justice Roberts took no part in the consideration or decision of this case.

[1]See Philadelphia Local Rule 3129*.

In The Supreme Court of Pennsylvania

WESTERN DISTRICT

ELMER A. LUSKEY, JR. and ROSE MARIE LUSKEY, his wife and W. ANTHONY DUNN v. STEFFRON, INC., a corporation *Appellant*	No. 71 March Term, 1975 Appeal from the Decree of the Court of Common Pleas of Allegheny County, Civil Division, at No. 2850 January Term, 1974 — Equity

ORDER

AND NOW, to-wit, this 9th day of May, 1975, reargument in the above captioned case is hereby ordered. All proceedings concerning this matter are hereby stayed. Counsel to brief and argue the above matter at the June Session in Philadelphia.

BY THE COURT

PER CURIAM

In The Supreme Court of Pennsylvania

WESTERN DISTRICT

ELMER A. LUSKEY, JR. and ROSE MARIE LUSKEY, his wife

and

W. ANTHONY DUNN

v.

STEFFRON, INC., a corporation

Appellant

No. 71
March Term, 1975

Appeal from the Decree of the Court of Common Pleas of Allegheny County, Civil Division, at No. 2850 January Term, 1974 — Equity

OPINION OF THE COURT

O'BRIEN, J. FILED: November 24, 1976

This appeal arises from a final decree in equity which set aside a sheriff's sale in Allegheny County.

The facts surrounding this appeal are as follows. In 1967 the Luskeys (appellees) of Slippery Rock, Lawrence County, were the record owners of two vacant parcels of land located in the Fifth Ward in the City of Pittsburgh. Subsequent to 1967, appellees sold the property and took back a bond and mortgage for the purchase price of the two parcels. The purchaser of the property defaulted on the mortgage and appellees foreclosed on the property and purchased the property at a sheriff's sale on May 15, 1970. The sheriff's deed to appellees was recorded on May 28, 1970.

Subsequent to the above sheriff's sale, a civil suit was filed against appellees by Albert B. Starr and, after hearing in which appellees participated, a judgment in the amount of $2,317.74 was entered against appellees on November 3,

1972. The judgment was not paid, and on April 4, 1973, Albert B. Starr assigned the judgment to appellant, Steffron, Inc. (Steffron). On April 10, 1973, Steffron, without notice to appellees, caused a writ of execution to issue against the property in the Fifth Ward in the City of Pittsburgh, and, pursuant to Pa.R.C.P. No. 3129, the sheriff posted handbills, advertised and sold the property at sheriff's sale. On May 3, 1973, Steffron bought the property for $1,701.27 which amount comprised costs, taxes and liened water charges. The property had been valued at $52,000 previous to the sale. Steffron recorded its sheriff's deed on November 30, 1973.

On November 13, 1973, the Luskeys entered into a sales agreement with appellee W. Anthony Dunn to sell him one of the parcels sold at the sheriff's sale. The Luskeys then learned of the sheriff's sale and brought an action to set aside the sale, and W. Anthony Dunn was permitted to intervene and adopt the Luskeys' complaint.

The complaint alleged, *inter alia*, that the sale to Steffron should be set aside because the Luskeys received no personal notice of the proposed sheriff's sale on May 3, 1973, at which time the property was bought by Steffron. The chancellor, after hearing argument on Steffron's motion for judgment on the pleadings granted the Luskeys relief, holding that the sheriff's sale to Steffron was invalid for lack of personal notice to the Luskeys.

On April 17, 1975, this court, in *Luskey v. Steffron No. 1*, 461 Pa. 305, 336 A.2d 298 (1975), declared Pa.R.C.P. 3129 violative of the due process clause of the United States Constitution in failing to provide personal notice to the owner of real estate that was the subject of a sheriff's sale. On May 9, 1975, this court granted reargument in the instant case for the purpose of determining the effective date of *Luskey No. 1*.

Prior to *Luskey No. 1*, this court and federal courts have found that notice by publication was adequate notice and comported with due process. See *Endicott Co. v. Encyclopedia Press*, 266 U.S. 285 (1924). Municipalities and purchasers have relied on such prior decisions and it would be manifestly unjust to negate clear titles to real estate purchased in good faith at sheriff sales, based on prior notice provisions, given such reliance.

However, as of April 17, 1975, the date of *Luskey No. 1*, notice was given to municipalities, courts and the legal profession that notice by publication in sheriff's sales was no longer constitutional. Therefore, we are of the opinion that *Luskey No. 1* is applicable to all sheriff's sales initiated after April 17, 1975.[1] See *Swarb v. Lennox*, 314 F.Supp. 1091 (1970) and *Gt. Northern Ry. v. Sunburst Co.*, 287 U.S. 358 (1932). See also 84 Yale L.J. 1505 (1975).

Decree affirmed. Each party to bear own costs.

Mr. Justice Roberts filed a concurring opinion in which Mr. Justice Manderino joined.

[1]On November 6, 1975, this court amended Pa.R.C.P. 3129 to conform with the mandate of *Luskey No. 1*. See Comment to Pa.R.C.P. 3129.

In The Supreme Court of Pennsylvania

WESTERN DISTRICT

ELMER A. LUSKEY, JR. and ROSE MARIE LUSKEY, his wife and W. ANTHONY DUNN v. STEFFRON, INC., a corporation *Appellant*	No. 71 March Term, 1975 Appeal from the Decree of the Court of Common Pleas of Allegheny County, Civil Division, at No. 2850 January Term, 1974 — Equity

CONCURRING OPINION

ROBERTS, J. FILED: NOVEMBER 24, 1976

I agree with the majority that our decision in *Luskey v. Steffron, Inc.*, Pa. , 336 A.2d 298 (1975), should be applied to all sheriff's sales initiated after April 17, 1975, the date of our original opinion. I also believe, however, that the same standards should apply to cases raising the inadequacy of notice which were pending and not finally litigated on April 17, 1975. Where the validity of a sheriff's sale was already in litigation it cannot be said that application of contemporary standards of due process would unreasonably cast a cloud on property titles. Moreover, application of our decision to cases pending on April 17, 1975, will ensure that individuals similarly situated to the Luskeys will be treated equally.

MR. JUSTICE MANDERINO joins in this concurring opinion.

In The Court of Common Pleas of Allegheny County, Pennsylvania Civil Division

ELMER A. LUSKEY, JR. and ROSE MARIE LUSKEY, his wife,
Plaintiffs,

and

W. ANTHONY DUNN,
Intervenor,

-v-

STEFFRON, INC.,
a corporation,
Defendant.

Appearance Docket
No. 2850 January Term,
1974 In Equity

OPINION

SILVESTRI, J.

This is an action in equity to set aside an execution sale of real property and for a reconveyance of the property to the plaintiffs which is before the court on the defendants filed motion for judgment on the pleadings and the counter-demand by the plaintiffs made at oral argument for judgment on the pleadings in their favor.

A motion for judgment on the pleadings is in the nature of a demurrer, *London v. Kingsley*, 368 Pa. 109, 81 A.2d 870 (1951);*Wark and Co. v. Twelfth & Sansom Corp.*, 378 Pa. 578, 107 A.2d 856 (1954); only the pleadings and documents properly attached thereto may be considered, *Bogojavlensky v. Logan*, 181 Pa. Super. 312, 124 A.2d 412 (1956); *Bonanni v. Weston Hauling, Inc.*, 392 Pa. 248, 140 A.2d 591 (1958); all well-pleaded facts, which are relevant and

material, must be accepted as admitted on such a motion, *Engel v. Parkway Co.*, 439 Pa. 559, 266 A.2d 685 (1970), *Aughenbaugh v. North American Refractories Co.*, 426 Pa. 211, 231 A.2d 173 (1967); *Eckborg v. Hyde-Murphy Co.*, 442 Pa. 283, 276 A.2d 513 (1971); and the motion should not be granted unless the right thereto is clear and free from doubt. *Wood v. Collingdale Borough*, 366 Pa. 624, 79 A.2d 228 (1951); *Bata v. Central-Penn Nat. Bk. of Phila.*, 423 Pa. 373, 224 A.2d 14 (1966); *Goldman v. McShain*, 432 Pa. 61, 247 A.2d 455 (1968). Notwithstanding that only one party may move for judgment on the pleadings, Pa. R.C.P. 1034 (b) requires the court to enter such order as shall be proper on the pleadings and thus it can be entered for either party. *Penn Wynne v. Lower Merion Twp.*, 181 Pa. Super. 524, 124 A.2d 487 (1956); *Emery v. Metzner*, 191 Pa. Super. 440, 156 A.2d 627 (1959); *Boron v. Smith*, 380 Pa. 98, 110 A.2d 169 (1955); *Ruska v. Philadelphia Life Ins. Co.*, 412 Pa. 418, 195 A.2d 93 (1963).

The pleadings reveal the following facts which are not in dispute and which are sufficient for a determination of the issues raised.

The plaintiffs, Elmer A. Luskey, Jr. and Rose Marie Luskey, his wife, herein the Luskeys, are residents of Slippery Rock, Lawrence County, Pennsylvania. In 1967, the Luskeys were the owner of two vacant parcels of real estate in the Fifth Ward of the City of Pittsburgh, Allegheny County, Pennsylvania, being designated in the Deed Registry Office of Allegheny County as Block 26-R Lot 80 and Block 26-R Lot 114. Both parcels were sold by Luskey who took back a mortgage and bond for the balance of the purchase price. The buyers defaulted on the mortgage and after foreclosure, the Luskeys purchased the property at the execution sale receiving a deed therefor from the Sheriff of Allegheny County on May 15, 1970 which was recorded on

May 28, 1970. At a subsequent deficiency judgment proceeding the court fixed the fair market value of the two parcels at $52,000.00 as of April 6, 1970.

As the result of a civil action instituted against the Luskeys by one Albert B. Starr, and after a hearing in which the Luskeys participated, a judgment in the amount of $2,317.74 was entered against the Luskeys on November 3, 1972. The judgment was not paid and on April 4, 1973 Albert B. Starr assigned the judgment to the defendant, Steffron, Inc., herein Steffron.

On April 10, 1973, Steffron issued execution on the judgment against both parcels of property without giving any personal notice to the Luskeys. After advertising and posting handbills pursuant to Pa. R.C.P. 3129 and the local rules of court, the Sheriff of Allegheny County on May 7, 1973, sold both parcels of the property to Steffron for $1,701.27, which amount consisted of costs, taxes and liened water charges. The Prothonotary of Allegheny County acknowledged the deed on June 15, 1973. The Sheriff filed his return of the sale with the Prothonotary on June 29, 1973, and on July 9, 1973, the Sheriff delivered the deed to both parcels of property to Steffron, who did not record it until November 30, 1973.

On November 13, 1973, the Luskeys entered into an agreement with Anthony W. Dunn to sell him one parcel of the property being Block 26-R Lot 114 for $16,500.00. Thereafter, but before November 30, 1973, the Luskeys learned of the Sheriff's sale of their property to Steffron and they then brought the within action on December 12, 1973 in which Anthony W. Dunn was permitted to intervene and he adopted the complaint of the Luskeys.

At all times herein, the Luskeys name and address in Slippery Rock, Pennsylvania was on file in the tax records of the City of Pittsburgh and Allegheny County and they did receive tax statements from the municipalities in 1973.

The Luskeys did not receive any post card notice of the Sheriff's return from the Sheriff pursuant to Local Rule of Court 3139(e) which provides: "Post card notice of the filing of the Sheriff's return shall be given by the Sheriff to the judgment debtor at his last known address."

Steffron contends that it is entitled to judgment because this action was brought after delivery to it of the deed to the property and there are no allegations in the complaint of fraud or want of authority for the Sheriff's sale.

The Luskeys contend that they are entitled to judgment because (1) the sale price was grossly inadequate, (2) the Sheriff's sale of the property was improperly a "lumping sale", (3) they did not receive post card notice of the filing of the Sheriff's return from the Sheriff as required by local rule of court 3139(e), and (4) their failure to be given prior personal notice of the execution when their names and address in Slippery Rock were readily and easily ascertainable was a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 1 of the Constitution of Pennsylvania.

Inadequacy of Price

As of April 6, 1970, this court had fixed the fair market value of the combined parcels of property at $52,000.00. The intervenor Anthony W. Dunn, has by written agreement, agreed to purchase one of the parcels for the sum of $16,500.00. The price paid for both parcels by Steffron at the Sheriff's sale on May 7, 1973 was $1,701.27 which was the sum total of taxes, liened water charges and costs. The mere recitation of the foregoing demonstrates the gross inadequacy of the price as to shock the conscience of the court.

The law in Pennsylvania is well settled that a sheriff's sale will not be set aside for mere inadequacy of price, but in

a clear case of inadequacy of price as to shock the conscience of the court, the court will seize hold of the slightest irregularity to set aside the sale. *Cooper v. Wilson*, 96 Pa. 409 (1881);*Wagener v. Yetter*, 280 Pa. 229, 124 Atl. 487 (1924); *Fenton v. Joki*, 294 Pa. 309, 144 Atl. 136 (1928); *Delaware County Nat. Bk. v. Miller*, 303 Pa. 1, 154 Atl. 19 (1931); *Warren Pearl Works v. Rappaport*, 303 Pa. 235, 154 Atl. 587 (1931); *Fidelity Bank v. Pierson*, 437 Pa. 541, 264 A.2d 682 (1970); *Haspel v. Lyons*, 41 Pa. Super. 285 (1909). However, in *Hettler v. Shephard*, 326 Pa. 165, 191 Atl. 581 (1937); *Peoples-Pittsburgh Trust Company v. Blickle*, 330 Pa. 398, 199 Atl. 213 (1938); and *Capozzi v. Antonoplos*, 414 Pa. 565, 201 A.2d 420 (1964), the Supreme Court stated that gross inadequacy of price is a sufficient basis in itself for setting aside a sheriff's sale.

Lumping Sale

It is the duty of the sheriff at an execution sale, whether of real property or personal property, to conduct the sale in such manner as to produce the highest price as the then existing circumstances will admit. Where the property is separate or distinct and it can be sold as to bring a higher price, then he must do so; however, if from the nature of the property and surrounding circumstances, the property can be sold in the aggregate at a higher price even though there may be a distinctness in the make up of the property, he will be permitted to so do. The sheriff should not blindly follow the instructions of the judgment creditor as to the manner of selling the property.

In the instant case, there were two parcels of property which in April of 1970 had a combined value of $52,000.00 and there was an outstanding agreement of sale for one parcel for $16,500.00. The extant agreement is evidence of the distinctness and separability of the two parcels. The sheriff, on instructions of Steffron, sold the property by the

aggregate. In *Rawley v. Brown*, 1 Binney 61 (1803) it was held: "It is the rule of this court to disallow in every case a lumping sale by the sheriff where from the distinctness of the items of property he can make distinct sales." There may be circumstances that may justify a sale by the aggregate but the purchaser must show the existence of such circumstances. Prima facie, a sale by the aggregate is not good. *Klopp v. Witmoyer & Arentz*, 43 Pa. 219 (1861); *Baker v. The Chester Gas Co.*, 73 Pa. 116 (1873); *Grim v. Reinbold*, 148 Pa. 446, 23 Atl. 1129 (1892).

No Receipt of Post Card Notice

The Luskeys made the bald assertion that they did not receive post card notice from the Sheriff of filing of the Sheriff's return as required by our local rule 3139(e), supra. There is nothing in the within record or in the papers and record of the execution at 2186 of 1973 to indicate whether or not the Sheriff mailed the post card notice to the Luskeys. If this factor were significant to the result we reach in this case, we would order additional evidence. However, a mere denial of the receipt of mail is not sufficient to establish that the item was not mailed or if mailed was not received. *Berkowitz v. Mayflower Securities, Inc.*, 455 Pa. 531 (1974).

Time to Attack a Sheriff's Sale

At any time before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale. Pa. R.C.P. 3132. It is unquestionable that had the Luskeys petitioned the court to set aside the sale prior to July 9, 1973, in view of the inadequacy of the sale price, the sale by the aggregate and failure to receive post card notice of filing of the Sheriff's return, assuming the Sheriff did not so mail, the Luskeys would be entitled to have the execution sale set aside.

The Luskeys did not file the within action until December 12, 1973, some five months after the delivery of the deed by the Sheriff to Steffron. It has long been the law of Pennsylvania that a Sheriff's deed will not be set aside after the deed was acknowledged and delivered except for fraud or want of authority to make the sale. The distinction is between irregularities in the proceedings, misdescription of the property, the sale of several trats as an entirety, defect of title and similar objections, on the one hand, all of which are foreclosed as defenses by the delivery of the Sheriff's deed, and, on the other, attacks upon the sale on the ground that it was unauthorized or vitiated by fraud, in which case the right of redress survives such delivery. The time to question irregularities in the execution on and sale of real estate is before delivery of the deed. Thereafter it is too late. Delivery of the deed cures all prior irregularities in the proceedings, except fraud or lack of authority for the sale. To hold otherwise would imperil titles to real estate. *Jackson v. Morter*, 82 Pa. 291 (1876); *Cooper v. Wilson, supra; Fenton v. Joki*, supra; *Knox v. Noggle*, 328 Pa. 302, 196 Atl. 18 (1938); *Garrison v. Erb*, 424 Pa. 306, 227 A.2d 848 (1967); *Concord-Liberty S&L Assn. v. N.T.C. Properties, Inc.*, 454 Pa. 472 (1973); *First National Bk. of Koppel v. Mount*, 132 Pa. Super. 518, 1 A.2d 547 (1938); *Petrovich Appeal*, 155 Pa. Super. 138, 38 A.2d 709 (1944).

From the foregoing it would appear that although there were irregularities in the execution proceedings, we are powerless to grant any relief therefrom unless the execution proceeding was so constitutionally deficient as to render it a nullity.

The Constitutional Issue

An execution writ is a judicial writ issuing from the court where a final judgment is rendered, directed to an officer thereof, and running against the body or property of a party,

by which the judgment of the court is enforced. C.J.S. Execution §1; 15 P.L.E., Execution, Chap. 1, Sec. 1. Where the judgment of the court is one for money, the primary object of an execution is the collection of the debt not the transfer of title. The transfer of title to the property sold is to obtain the funds to apply to the satisfaction of the judgment.

In any legal proceeding calculated to determine rights and liabilities and concluding with a final judgment, it is horn-book law that the proceedings must comport with both procedural and substantive due process or the entire proceeding is rendered a nullity. A final judgment entered pursuant to a due process protected proceeding is a final determination of the relative rights and liabilities of the parties as to the subject matter of the proceedings. Where the judgment is one for a sum of money, the effect thereof is merely a legal determination of liability of the judgment debtor for the sum of money. The judgment in and of itself and without more does not satisfy the debt. The judgment is the vehicle for collecting the debt by execution and levying on the property of the judgment debtor to realize the sum of money represented by the judgment. Once a judgment is final, there is no legal compulsion on the judgment creditor to proceed to execution. The judgment creditor has the option of proceeding forthwith with execution, proceed at some unspecified time in the future, periodically revive the judgment or do nothing. In the instant case, Albert B. Starr obtained his judgment on November 3, 1972. He did nothing with the judgment until April 4, 1973 when he assigned it to Steffron who within six days thereafter issued execution. The judgment debtor is under no legal compulsion to forthwith pay a money judgment, although he may do so, or where the judgment creditor does nothing the judgment debtor may do nothing.

Real estate, because of its limited quantity, permanency, location and content, is unique and the only material item

of lasting value. Ownership of real estate is desired, sought after and prized. The benefits of ownership of real estate are also accompanied by burdens, among which are its attachment and sale for the satisfaction of money judgments. The end product of a lawsuit is not an academic exercise for the theoretical determination of rights and liabilities but the enforcement of the determined right and if that right be an entitlement to a sum of money, the collection of the sum of money. As the adjudication proceeding is separate and distinct requiring due process safeguards, so the enforcement of the adjudicated right is a separate and distinct proceeding, and since the enforcement is by way of compulsion by the governmental institution of the courts, it too must be accorded procedural due process protections. The notice required to a judgment debtor in an execution proceeding which is calculated to strip him of all or part of his property, real or personal, can be no less than the notice required for obtaining the finality of judgment upon which the execution is based.

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the court addressed the constitutional sufficiency of the publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement of accounts. In holding that the publication notice offended due process, the court said: ". . .'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiese or contest.

"The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be

utilizied or what test it must meet. Personal service has not in all circumstances been regarded as indispensible to the process due to residents, and it has more often been held unnecessary as to non-residents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U.S. 457; *Grannis v. Ordean*, 234 U.S. 385; *Priest v. Las Vegas*, 232 U.S. 604; *Roller v. Holly*, 176 U.S. 398. The notice must be of such nature as reasonable to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Ferris*, 214 U.S. 71.

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, . . ., or where condtiions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this

court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed." The court went on to say that publication traditionally has been acceptable as notification supplemental to other action which in itself may reasonably be expected to convey a warning and publication has been approved in those class of cases where it is not reasonably possible or practicable to give more adequate warning, recognizing that in the case of persons missing or unknown, employment of an indirect and even a futile means of notification is all that the situation permits and creates no constitutional bar to a final decreee foreclosing their rights. As to persons of known place of residency the court said: ". . ., notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency."

In *Robinson v. Hanrahan, State Attorney of Cook County*, 409 U.S. 38, 34 L.Ed. 2d 47, 93 S.Ct. 30 (1972), after jailing Robinson for robbery, the state instituted forfeiture proceedings against his automobile. The state mailed notice of the forfeiture proceeding, not to the jail facility, but to his home address listed in the records of the Secretary of State. The court, citing *Mullane*, held that since the authorities knew the whereabouts of Robinson the notice was inadequate and set aside the proceedings. In reply to the

argument that the forfeiture proceeding was one in rem, an argument which may also be raised in an execution sale proceedings, the court again cited *Mullane* which held that the distinction between actions in rem and those in personam are ancient and originally expressed in procedural terms what really seems to have been a distinction in the substantive law of property under a system quite unlike our own. However a state court may classify its proceedings, the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state.

In *Eisen v. Carlisle & Jacquelin*, U.S. , L.Ed. , S.Ct. , (1974) the court addressed itself to the notice provisions of Fed. R.C.P. 23(c), as amended, which in the case before the court provided for individual notice to class members in (b)(3) actions and the district court because of the large number of potential class members authorized notice by publication. The court again citing *Mullane*, said that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process and held that notice by publication is not enough and could not satisfy due process with respect to persons whose names and addresses are known or very easily ascertainable. See also *Schroeder v. City of N.Y.*, 371 U.S. 208, 9 L.Ed. 2d 255, 83 S.Ct. 279 (1962).

"Due process of law" does not lend itself to exact definition, but as was said in *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 57 L.Ed. 1427, 33 S.Ct. 1033 (1913): "The principle known to the common law before Magna Charta, was embodied in the charter (Coke, 2 Inst. 45, 50) and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be

uncertain about the definition of the term 'due process of law' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing." Procedural due process is a basic concept of fair play which requires for its determination a close examination of facts and procedure of each situtaion. *Mullane v. Central Hanover Trust Co.*, supra; *Angel v. Commonwealth*, 396 Pa. 514, 153 A.2d 912 (1959); *Pocono Pines Corp. v. Commonwealth*, 10 Commonwealth Ct. 466 (1973); *First National Bank of Pike Co. v. Dept. of Banking*, 7 Commonwealth Ct. 603, 300 A.2d 823 (1973).

In the case of *First Fed. S. & L. Ass'n. of Greene County v. Porter*, 408 Pa. 236, 183 A.2d 318 (1962), a mortgage foreclosure case, which arose prior to the effective date of Pa. R.C.P. 3101 et seq relating to the enforcement of money judgments, wherein the advertisement and handbills did not set forth the name of the real owner, the court stated: "The Act of 1929 (Act of May 6, 1929, P.L. 1557 §1, as amended, 21 P.S. §804), provided that the sheriff shall give notice of a sale thereunder 'in the manner now provided by law'. The notice required in this case was, therefore, basically prescribed in the Venditioni Exponas Act of June 16, 1836, P.L. 775 §62, 12 P.S. §2443, which was then extant, and required (1) the posting of a handbill on the property at least ten days before the sale giving notice of the hour, day and date of sale, and a description of the property; and (2) notice to the defendant. However, the Act of July 22, 1919, P.L. 1089, §1, 45 P.S. §81, which supplemented the Act of 1836, was also operative and controlling. This statute provided that the notice of such a sale should be given by posting, plus newspaper advertisements, over a period of three weeks and specifically stated that these notices shall include, inter alia, the names of the owners or reputed owners of the property to be sold.

"Further, the rules of the Court of Common Pleas of Allegheny County, specifically Rule No. 32(a), which was in effect when the writ of execution was issued in the instant case required that, in all judicial sales, the advertisements published in the newspapers giving notice of a sale, shall include the names of the owners or reputed owners of the property to be sold.

"The clear effect and intent of the Act of 1919, supra, and the rule of court mentioned was to require that all interested parties be given notice before a property was forfeited at a judicial sale.

"It would appear to us, therefore, that in the absence of actual notice to the then real owner of the property, the failure to include in the handbills or in the newspaper advertisements the name of the then real owner of the property vitiated the proceedings and sale, was violative of prescribed statutory procedure and *constituted the taking of property in violation of due process of law.*•"

The purpose of advertising and posting of handbills in the sale of real property on an execution is to give notice to the property owner that his, her or their real estate is going to be sold to seek satisfaction of a judgment. It also serves the additional purpose of notifying the public of the sale to attract bidders so that the property will be sold at the highest possible price. The predominate purpose is to give notice to the owner of the property as the failure to name the real owner in the advertisment and/or handbills is violative of due process and renders the entire proceedings a nullity. *First Fed. S. & L. Ass'n. of Greene County v. Porter*, supra.

Pa. R.C.P. 3129 provides that the notice of sale of real property shall be given by the sheriff by handbills posted in the sheriff's office and upon the property at least ten days

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•Emphasis ours.

prior to sale and also by publication by the sheriff once a week for three successive weeks in a newspaper of general circulation in the county and in the legal publication. There is no provision for personal service on the judgment debtor or the property owner in Pa. R.C.P. 3129 or any other rule relating to the enforcement of money judgments where the judgment debtors real estate is to be sold on execution.

It is unrealistic to believe that the judgment debtor will actually be made aware of the sale by posting a handbill in the sheriff's office or by publication in the legal publication designated by rule of court. Few, if any, members of the public visit the sheriff's office unless they have specific business therein and if they did so visit the sheriff's office the likelihood of their seeing a particular handbill for a particular piece of property is remote. We take judicial notice of the sad fact that a substantial number of members of the Allegheny County Bar do not subscribe to the official legal publication of the county. This being so, it is also a fact that the public does not subscribe to it and thus would never be made aware of its contents. Advertising in a newspaper of general circulation is not likely to make the owner of the real estate aware of the sale of his property. What was said by the *Mullane* court, supra, is sufficient, and need not be repeated, to nullify any argument to the contrary. Posting of handbills on the property may bring to the attention of the real owner that the property is going to be sold at a sheriff's sale in an execution proceeding provided that the real owner is in good health and resides continuously in and on the property and provided the handbill is conspiculously placed so that the real owner will see it. However, the owner may be away on vacation or ill in a hospital or other medical facility and thus never see the handbill. Absentee ownership is not uncommon, as in the instant case, and the absentee owner may reside in the same county as the property or in another county, as again in the instant case, or out of state. If the

property is vacant it is unlikely that the absentee owner will ever see the handbill and if the property is occupied by a tenant, if the tenant saw and understood the handbill, whether or not the tenant would notify the absentee owner or his agent, if the lease was made by an agent, would depend on the attitude of the tenant towards the absentee owner or his agent. Further the handbill may be removed by vandals, the elements or fall off because not firmly affixed to the property.

The chances of a real owner getting actual notice that his real estate is to be sold by way of the notice provision of Pa. R.C.P. 3129 are, to use a picturesque phrase, "slim and none". Due process is not a game of chance.

Real estate is immovable and is a primary base for taxes. The county, the cities, boroughs, townships and school districts levy taxes on real estate and maintain records of the names and addresses of the owners and mail tax notice statements to them. The Luskeys received tax statements from the taxing bodies. Mortgage companies also have records of the name and address of mortgagors. There are other records both public and private which list the names and addresses of property owners.

The notice provided for in Pa. R.C.P. 3129 is inadequate and the language of the *Mullane* court again is apropos: "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." To say that the notice provisions of Pa. R.C.P. 3129 is actual notice to the owner by the fiction of constructive notice is a denial of due process. Publication and the posting of handbills may theoretically be available for the whole world to see, but it is too much in this time of our history to suppose that each or any individual property owner does or could

examine all that is published or posted, not only in his home county but also in other counties where he owns property to see if something may be tucked away in it that affects his property interest. In notice by publication great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact. *Mullane v. Central Hanover Trust Co.*, supra; *McDonald v. Mabee*, 243 U.S. 90, 61 L.Ed. 608, 37 S.Ct. 343 (1917).

Due process requires that where the name and address of the real owner of real estate is known or easily ascertainable, he must be given personal notice of the issuance of any writ of execution for the sale of his real property and notice by publication alone is inadequate.

Equal protection of the law as required by the Fourteenth Amendment to the United States Constitution also dictates personal notice of the issuance of the writ of execution for the sale of the real property.

Local Philadelphia County Civil Rules 3129• (f)(1) and (2) [1] provide for ten days prior notice by personal service

[1] Rule 3129•(f)

•(f)(1)*Notice to Be Given Prior to Execution upon Judgment Entered on Bond Accompanying a Mortgage*. No execution shall issue upon a judgment entered on a bond accompanying a mortgage to condemn or sell the mortgaged premises unless the plaintiff, or some person on his behalf, shall file of record an affidavit setting forth, to the best of his knowledge, information, and belief, the name and address of the real owner or owners of the premises, and that written notice of the date of entry of said judgment, with the court, term, and number thereof, has been sent by registered or certified mail to such owner or owners and to the obligor in the bond. If the affidavit shall aver that the plaintiff, or the person making the affidavit on his behalf, does not know and has not been able to ascertain the owner or owners of the mortgaged premises or their addresses, or the names or addresses of some of them, or the whereabouts of the obligor, such an affidavit shall be a compliance with this rule as to the owner or owners and obligor whose names or addresses are unknown.

(continued)

be given by the plaintiff to the defendant in the writ of execution and the real owner of real estate to be sold stating the place, date and hour of the intended sale and before the date of sale file an affidavit that such notice has been given or that he does not know and has not been able to ascertain the names and addresses of the real owner and the defendant in the writ.

In 1949, the Supreme Court in *Dearnley v. Survetnick*, 360 Pa. 572, 63 A.2d 66, (1949) had before it Philadelphia local rule 96 (2) which was the forerunner and the same as local rule 910(b), now rule 3129•(f) (2). The court approved the rule. After quoting the rule the court affirmed the Philadelphia trial court in setting aside an execution sale of property for failure to comply with the local rule. The local rule, 3129•(f) (2), was again approved by the Supreme Court in *Doherty v. Adal Corporation*, 437 Pa. 109, 261 A.2d 311, (1970).

The Fourteenth Amendment to the Constitution of the United States expressly forbids a state to deny any person

(2) *Notice to Be Given upon Any Execution for the Sale of Real Estate*. At or after the time of the issuance of any writ of execution for the sale of any real estate, the plaintiff, or some person on his behalf, shall give written notice by personal service on, or by registered or certified mail to, the defendant in the writ and to the real owner or owners of the real estate to be sold, stating the place, date, and hour of the intended sale and the real estate to be sold, which date shall be at least ten days after the giving of such notice as aforesaid, and shall, before the date of the sale, file an affidavit in the office of the prothonotary that said notice has been given in accordance with this rule, or that the plaintiff or the person making the affidavit on his behalf does not know and has not been able to ascertain the real owner or owners of said real estate or their addresses, or the names or addresses of some of them, or the whereabouts of the defendant in the writ, in which case such an affidavit shall be a compliance with this rule as to the real owner or owners whose names or addresses are unknown, or as to the defendant in the writ whose whereabouts is unknown.

the equal protection of the laws. This clause is a pledge of the protection of equal laws and its requirements is satisfied if the laws operate on all alike as to all persons similarly situated.

The Supreme Court of Pennsylvania is an institution of government and is clothed with the power to finally state the law of Pennsylvania. The law as stated by the Supreme Court must apply equally to all persons similarly situated as is required of the legislature in the enactment of statutes.

If owners of real property located in Philadelphia County are entitled to personal notice of the issuance of a writ of execution for the sale of their real estate so are the owners of real property in Allegheny County and any other county in Pennsylvania so entitled. The Supreme Court having approved and given effect to the Philadelphia County rule requiring personal notice to owners of any execution sale of real estate, it would be a denial of equal protection of the laws violative of the Fourteenth Amendment to the United States Constitution not to require the same personal notice to owners of real property in any other county of Pennsylvania.

The Luskey's name and address were readily available from the tax records of Allegheny County. Failure to give them personal notice of the issuance of the writ of execution for the sale of their real estate was a deprivation of their right to due process of law and the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 1 of the Constitution of Pennsylvania rendering the execution sale of their property a nullity.

ORDER

AND NOW, this 30 day of September, 1974, after argument, consideration of the briefs of the parties and a review of the pleadings, it is hereby ORDERED AND DECREED that the defendants motion for judgment on the pleadings is denied and that judgment is entered for the plaintiff as follows:

1. The execution sale held on May 7, 1973 pursuant to the writ of execution issued at 2186 of 1973 in the Court of Common Pleas of Allegheny County wherein Steffron, Inc. was the plaintiff and Elmer A. Luskey, Jr. and Rose Marie Luskey, his wife, were the defendants is void and set aside.

2. The deed acknowledged and delivered by the Sheriff of Allegheny County to Steffron, Inc., pursuant to the aforesaid execution sale and recorded in the Recorder of Deeds office in and for Allegheny County in Deed Book Volume 4777, page 722 is cancelled.

3. The defendant may, without prejudice, proceed to enforce its judgment consistent with this opinion.

BY THE COURT,

...../s/ SILVESTRI, J.....

PENNSYLVANIA RULES OF CIVIL PROCEDURE

RULE 3129. Notice of Sale. Real Property

(a) Notice of the sale of real property shall be given by the sheriff by handbills posted in the sheriff's office, and upon the property at least ten (10) days prior to sale, briefly describing the property to be sold, its location, the improvements, if any, the judgment of the court on which sale is being held, the name of the owner or reputed owner and the time and place of sale.

Note: Where real estate subject to Federal liens is sold in execution under a judgment by confession, see the provisions of the Federal Tax Lien Act of 1966 adding sec. 7425(c) to the Internal Revenue Code, 26 U.S.C.A. §7425(c), providing for notice to the United States.

For special rules requiring notice to defendants on judgments by confession see Rule 2958.

(b) Notice as provided in Subdivision (a) shall also be given by publication by the sheriff once a week for three (3) successive weeks in a newspaper of general circulation in the county and in the legal publication, if any, designated by rule of court for publication of notices, the first publication to be made not less than twenty-one (21) days before the date of sale.

Note: See Note To Rule 3128 as to time, terms and conditions of sale. See also Rule 3131 as to advertisement where a parcel of real property extends across county lines.

(c) The notice of sale provided in Subdivisions (a) and (b) shall include a notice directed to all parties in interest and claimants that a schedule of distribution will be filed by the sheriff on a date specified by the sheriff not later than thirty (30) days after sale and that distribution will be made in accordance with the schedule unless exceptions are filed thereto within ten (10) days thereafter. No further notice of the filing of the schedule of distribution need be given.

(d) If the sale is stayed or continued or adjourned generally, new notice shall be given as provided by Subdivisions (a), (b) and (c). If the sale is continued or adjourned at the direction of the plaintiff to a date certain within forty-five (45) days, and public announcement of the adjournment and new date made to the bidders assembled at the time and place originally fixed for the sale, no new notice shall be required, but there may be only one such continuance or adjournment to a date certain without new notice.

(e) The court may be general rule or special order require additional notice to the defendant. Adopted March 30, 1960. Eff. Nov. 1, 1960. Amended March 22, 1962. Eff. April 2, 1962.